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IN THE

Supreme Court of the United States

October Term, 1970
No. 695

ALVIN WEINGAND, *et al.*,

Petitioners,

vs.

WALTER J. HICKEL, *et al.*,

Respondents.

COUNTY OF SANTA BARBARA, *et al.*,

Petitioners,

vs.

WALTER J. HICKEL, *et al.*,

Respondents.

COUNTY OF SANTA BARBARA, *et al.*,

Petitioners,

vs.

ROBERT J. MALLEY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondent in Opposition.

Opinions Below.

The Court of Appeals, Ninth Circuit has determined that the District Court did not abuse its discretion in refusing to issue a preliminary injunction.

Jurisdiction.

Respondent contends that petitioner has not made a sufficient showing of a "substantial and important" question to properly confer jurisdiction on this court, pursuant to U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

Questions Presented for Review.

Although petitioners have attempted to raise certain constitutional issues, at this juncture, the only issues properly before this Court are:

1. Did the United States District Court abuse its discretion in refusing to issue a preliminary injunction in the two "Hickel" cases or in the "Malley" case;[1] and

2. Did the United States Court of Appeals for the Ninth Circuit abuse its discretion in awarding costs to the respondents.

Statement of the Case.

Respondent incorporates herein by reference respondent Humble Oil & Refining Company's statement of the case as the same is set forth in their Brief, save and except for the fact that respondent Texaco Inc. is a defendant in each of the two "Hickel" cases as well as in the "Malley" case.

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[1]For ease of reference in this brief the cases of *County of Santa Barbara v. Hickel*, No. 25413 in the court below and *Weingand v. Hickel*, No. 25414 in the court below, will be collectively referred to as the *"Hickel"* cases and *County of Santa Barbara v. Malley*, No. 25049 in the court below, will be referred to as the *"Malley"* case.

ARGUMENT.

It should be noted that in the "Malley" case, Petitioners are seeking a mandatory injunction requiring Robert J. Malley, District Engineer of the Army Corps of Engineers, to grant Petitioners a public hearing before acting on any application for permits to construct new oil drilling facilities in the Santa Barbara Channel on the Outer Continental Shelf. In the "Hickel" cases Petitioners seek a mandatory injunction requiring Walter J. Hickel, the Secretary of the Interior, to hold public hearings and to make available to the general public certain data collected by his department. It is well established that certain criteria must be met before a court will issue a preliminary injunction in any event. However, when the relief sought is of a mandatory nature these criteria become stricter and they must be even more strictly followed.

See *e.g.*

Automatic Radio Manufacturing Co. v. Ford Motor Co., (C.A. 1st Cir., 1968) 390 F. 2d 113).

Petitioners have framed the issue before this Court in their brief wherein it is stated that they ". . . [p]ray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit affirming judgments of the United States District Court, Central District of California, denying motions for preliminary injunctions." [Petition p. 2, lines 1-5].

Petitioners then attempt to raise certain constitutional issues at page 4 of their petition; however, it is submitted that petitioners are foreclosed from so doing because these issues are not properly before this court at this time as they are presently before the three-judge

District Court, convened under 28 U.S.C. §§ 2282 and 2284. Petitioners have both requested and consented to the convening of such three-judge court and they should not now be allowed to circumvent that court through this Petition (See petitioners' second claim for relief in the *County of Santa Barbara, et al. v. Hickel, et al.*, No. 25,413). Even if it were conceded that any constitutional question did present itself in this case, which concession is not made, then such question should properly be resolved by the three-judge court. Until such court has made a determination of the application of the Constitution to the issues presented in this case, this Court should not at this stage of the proceedings have thrust upon it the alleged constitutional issues petitioners are attempting to invoke. *Florida Lime & Avocado Growers, Inc. v. Jacobsen,* (1960) 362 U.S. 73, 80 S. Ct. 568, 4 L. Ed. 2d 568.

Moreover, since this is a writ which purports to review the judgments of two lower courts, the only matter properly reviewable by this court is whether or not those courts in denying the petitioners' motion for a preliminary injunction in the first instance and in affirming that refusal in the second instance have abused their discretion. *United States v. W. T. Grant,* 345 U.S. 629 (1953); *Meccano, Ltd. v. John Wanamaker,* (1920) 235 U.S. 136, 141, 40 S. Ct. 463, 64 L. Ed. 822.

Turning then to the real issues at hand:

1. **Did the United States District Court Abuse Its Discretion in Refusing to Issue a Preliminary Injunction in the Two "Hickel" Cases or in the "Malley" Case?**

The petitioners make no allegations in their brief that the lower courts have in any way abused their dis-

cretion either by denying the motion in the District Court or by affirming such denial in the Court of Appeals. Because of such failure to assert that either of these courts have abused their discretion, the Petition for Writ of Certiorari should be dismissed out of hand with nothing more said.

A court may properly deny a motion for a preliminary injunction upon any one or more of the following grounds:

(a) If the plaintiff fails to show an irreparable injury *Katzenback v. McClung*, (1964) 379 U.S. 294, 85 S.Ct. 377, 13 L. Ed. 2d 290; *Meiselman v. Paramount Film Distribuing Corp.*, (C.A. 4th 1950) 180 F. 2d 94, and *Sims v. Greene*, (C.A. 3rd 1947) 161 F. 2d 87;

(b) If the harm to the defendant, which would result from the issuance of the injunction, exceeds the benefit to the plaintiff, even if the plaintiff is ultimately successful *American Federation of Musicians v. Stein*, (C.C.A. 6th 1954) 213 F. 2d 679, cert. den. 75 S. Ct. 108, 348 U.S. 873, 99 L. Ed. 687;

(c) If by granting the preliminary injunction the court would be awarding the plaintiff the full measure of relief to which he normally would be entitled only in the event he were successful after a trial on the merits *Poe v. Michael Todd Co.*, (D.C.N.Y. 1957) 151 F. Supp. 801;

(d) If the plaintiff fails to prove that the case "clearly" warrants the issuance of a preliminary injunction, or if he fails to show a clear right to such a form of relief *U.S. v. Borden Co.*, (1954) 347 U.S. 514, 74 S. Ct. 703, 98 L.Ed. 903;

(e) If the applicant fails to convince the court "with reasonable certainty" that the applicant will succeed at the trial *Nadya, Inc. v. Majestic Metal Specialties*, (D.C.N.Y. 1954) 127 F. Supp. 467.

The foregoing grounds formed the basis for the District Court's decision to deny petitioner's motion for a preliminary injunction. Each of said grounds is sufficient of itself to uphold the District Court's denials of Petitioner's motions. Thus, it is manifest that the District Court did not abuse its discretion. Moreover, Petitioner has not even made the contention that the District Court abused its discretion in denying the motions for preliminary injunctions. It, therefore, of necessity follows that the petition for writ should be denied.

In addition to the foregoing, respondent Texaco Inc. adopts by reference the excellent and thorough argument made by respondent Humble Oil & Refining Company, *et al.*, in its Brief filed with this court.

2. Did the Court of Appeals Abuse Its Discretion in Awarding Costs to the Respondents?

Rule 39(a) F. R. App. Proc. states that ". . . Costs *shall* be taxed against the appellant. . . ." (Emphasis added.) It would appear that the use of the term "shall" makes the rule mandatory. Hence, the Court of Appeals was required to grant costs to appellees. If the provision is construed as discretionary then the petitioners have failed to show that the Court of Appeals abused its discretion in taxing costs to the petitioner-appellants.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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